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[ORIGINAL CIVIL JURISDICTION.]

McELWAINE, C.J.

November 10, 1936.

GEK LAU CHOON THEATRICAL COMPANY

v.

HU KIANG YAN.

[SINGAPORE SUIT No. 171 of 1936.]

Evidence Ordinance, Sections 92 and 93—Separate oral agreement not inconsistent with written agreement.

When a separate collateral agreement not inconsistent with a written agreement is alleged, the law views with suspicion such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract. They must be proved strictly. Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties must be clearly shewn.

Heilbut Symons & Co. v. *Buckleton*, (1913) A.C. 30 followed.

TRIAL OF ACTION.

Davies for plaintiffs.

Oehlers for defendant.

The facts and arguments sufficiently appear from the judgment.

Cur. Ad. Vult.

McELWAINE, C.J.—The Defendant on the 16th March, 1936, signed a contract dated the 21st day of the second Moon of the Republic Piachu year (corresponding to the 14th day of March, 1936) engafing the Gek Lau Choon Teochew troupe of males and females to perform plays for fifteen days from 16th March, 1936, to 30th March, 1936, at a fee of $1,800 of which $700 was to be paid at once, and $75 on each day for fourteen days and $50 on the fifteenth day thus making up the agreed sum of $1,800.

The Plaintiff admits having been paid $1,150 in all and sues for the balance of $650.

The defendant admits that $650 is due under the agreement but sets up in a counterclaim a collateral oral contract under which he claims damages. The defendant also sought to prove that the true consideration was $1,500, that his initial payment was $400 not $700. Mr. Davies objected to such proof and as there was no suggestion made of fraud or mistake I ruled that such evidence could not be admitted to vary the written contract. It was submitted on behalf of the defendant that this evidence might be given to test credibility but I considered that its value for this purpose would be insignificant.

The main controversy in this case turned round on an actress named Han Gor, a lady in a very advanced stage of pregnancy. The defendant alleged that prior to the execution of the written contract the Plaintiff by his manager Tan Gee Jin agreed to pay to the defendant damages calculated on the loss of takings (but not exceeding $1,000) in the event of Han Gor being confined before the conclusion of the contract. Han Gor was in fact confined on the 18th March and was absent from the theatre for 8 days from 18th to 25th March, both days inclusive. She resumed her place on the stage on 26th March.

The plaintiff denied that any such oral agreement was made and says that if such an agreement was made Tan Gee Jin had no authority to make it. On this second point I was satisfied that Tan Gee Jin had authority to make such a contract. Tan Gee Jin is the manager of the plaintiff company; he signed the duplicate of the written contract handed to the defendant; he received all the payments that were made under the contract, and he demanded payment of the sums outstanding. As this witness said "I had power to negotiate with the defendant." All the negotiations for the contract were conducted by this man.

The Managing Partner of the theatrical troupe, Tan Peng Khuang, said that Gee Jin had full power to negotiate with the defendant, and that he (Tan Peng Khuang) had nothing to do with signing the agreement. I found that the business of the troupe was conducted almost altogether by Tan Gee Jin and that he had authority to make any contract in connection with the engagement of the troupe including a contract such as the oral contract alleged to have been made.

At the conclusion of the evidence at the request of Mr. Oehlers and with the consent of Mr. Davies I allowed Mr. Oehlers to amend paragraph 4 of the defence and counterclaim to read:

> "On and after the 18th day of March, 1936, up to and including the 25th day of March, 1936, the Plaintiff Company performed without the principal actress Han Gor, the Plaintiff Company's manager having agreed on 14th March, 1936, to pay to the defendant damages fixed at a sum not exceeding $1,000 to be calculated on the loss of takings and an allowance for damages in consideration of the defendant executing the contract to hire the Company."

The Plaintiff denied that such a contract had been made and Mr. Davies submitted that proof of such a contract could not be given, referring to sections 92 and 93 of the Evidence Ordinance. In my opinion a collateral oral contract such as that alleged to have been made is provable under the second proviso to section 93 which reads "The existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved."

This proviso sets out what I understand to be the English law as laid down in such cases as *Lindley* v. *Lacey*, 17 C.B. (N.S.) 578, *Morgan* v.

Griffiths, L.R. 6 Ex. 70, *Angell* v. *Duke*, L.R. 10 Q.B. 177.

Conversations leading up to the making of a contract are not presumed themselves to form a collateral contract. As Lord Haldane said in *Heilbut, Symons & Company* v. *Buckleton* (1913) A.C., at p. 37 " It is contrary to the general policy of the law of England to presume the making of such a collateral contract in the absence of language expressing or implying it. My Lords, words which on the face of them appear to be simply representations of fact may, if the contract so requires, import a contract of warranty." And Lord Moulton at page 47—" It is evident, both in principle and on authority, that there may be a contract the consideration of which is the making of some other contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shewn."

If therefore it is clearly shewn that a conversation immediately before the execution of a written contract made between the parties to the conversation was intended by both parties to be a contract it may be proved provided it is not inconsistent with the written contract.

I would here revert to the second proviso to section 93 of the Evidence Ordinance (Chapter 13) the concluding clause of which reads " In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document." This I take to mean that the more formal the written document is, the more suspicious the Court must be as to the existence of a collateral contract, and if the contract is informal less suspicion attaches to the attempt to set up a collateral contract.

In the present case the written contract is a printed Chinese document in which certain blanks are filled in. It was not witnessed. There was no evidence that the document was in a form settled by a lawyer and to judge from the translation made by a Court Interpreter and accepted by both parties the written contract was not a model of lucidity. It is noticeable that " the makers of this proof are Swee Thye & Company of the Ee Hng of this town." The contract was signed by the defendant who has nothing to do with Swee Thye & Company. It was defendant's first, and apparently last, theatrical adventure.

There are terms in the written contract upon the meaning of which fortunately the parties were agreed. Otherwise I might have found difficulty in construing " Agreed that every day $75 is to be taken "; " Agreed that the rent of the theatre is $25 per day."

I do not regard this document as possessing any high degree of formality. The actress Han Gor was alleged by the defendant to be a great attraction in the troupe—the principal actress in fact. The plaintiff denies that she was the principal actress or chief attraction. Her salary was sworn to be $40 per month while another actress in the company received $50 per month. She had formerly been in another theatrical Company in Singapore—the Seng Sai Poh Company. She was in China when the Plaintiff sent some one to China to engage her.

Now there is no dispute that Han Gor s condition was discussed from a business point of view before the contract was signed. There is no doubt she was an important member of the troupe. When she went to hospital on 18th March the play in which she had been billed to appear and which had been selected by the defendant had to be cancelled by the plaintiff's manager Gee Jin and a different play in which Han Gor had no part was substituted by him. There was a sudden drop between the takings on the night of 17th March when she appeared and those of the 18th when she was not on the play bill. On the play bill for the 26th March when she returned to the stage the list of *dramatis personae* is headed " Tonight Han Ngoh's best " Han Ngoh being the same person as Han Gor the actress in question.

Soon Meow who was paid commission for the contract by Gee Jin regarded Han Gor as " important." " Hen Han Gor joined the company it became famous."

Ng Cheok described her as the principal actress. " The theatre is not so popular when she is not there."

It is also to be noticed that Han Gor only acted at night, these performances being more important than the matinees in which she did not appear. I found that Han Gor was an important attraction.

Soon Pheow, the ticket collector of the Ee Hng theatre (which the defendant subsequently hired for the performances) and who acted as a broker for the local companies, was asked by Gee Jin to look for some one to hire the plaintiff company. He approached Ng Cheok who was well acquainted with the company and who knew Han Gor. Ng Cheok refused to hire the company " because the troupe was depending on one actress Han Gor and she was expecting a baby." He arranged a meeting between the defendant, Gee Jin (the plaintiff's manager), Soon Pheow and himself.

I pause here to observe that Ng Cheok, who was first approached, is the sole proprietor of Chop Swee Thye & Company whose name, as I have already mentioned, is inserted as one of the parties in the written contract.

The meeting above referred to was held on the 14th March. There were in fact two meetings that day when the agreement was discussed. At one of these meetings the managing partner of the plaintiff company (Tan Peng Khuang) was present but took a very minor part in the discussions which I am satisfied were conducted on his behalf by Gee Jin.

Tan Peng Khuang said "I did not tell defendant anything about Han Gor. She was about to give birth at the time. Defendant knew that. I mentioned that to him at the time of making the agreement, before it was signed. I told defendant about Han Gor because I thought he might not go on with the contract if he knew she could not act." Gee Jin in evidence stated "Defendant remarked about Han Gor being about to give birth. I said 'yes, in a few days time.' I could not give a definite day. Defendant was willing to enter into the agreement in spite of what I said about Han Gor." Later this witness said "The question of Han Gor's health was mentioned by me first. I thought it better to mention it to avoid future dispute." He denied any agreement for compensation. The defendant gave evidence of this conversation and he called as supporting witnesses Soon Pheow and Ng Cheok. The defendant swore "I mentioned I do not want to hire the company because Han Gor expects to give birth. The last witness (Gee Jin) said she would not give birth till next month (April). He promised compensation of $1,000 if she did not (i.e. if she were unable to act) so I agreed to engage the Company." Nothing here was said about loss of takings. Later in his evidence he said that at his interview with Gee Jin on the 16th after Han Gor had gone to hospital Gee Jin said "never mind, carry on. We will go into accounts later on—accounts about damages." If this was said it would be an admission by Gee Jin that damages were to be paid, and that they were to be calculated in some way from the accounts, but whether on profits or losses or on gross takings or on net takings is left indeterminate. In cross-examination defendant said "If I made a profit out of this venture I would still ask for damages." On this evidence the damages were not payable on loss of profits. Upon what were they payable? The defendant himself says nothing about accounts or takings or losses. An account book was put in evidence giving a detailed statement of takings and expenditure for each day of the contract. It was only in the two first days that Han Gor acted (16th and 17th March) that the net profits exceeded the $75 which had to be paid out of net profits to the plaintiff.

Now the gross takings on these two nights were $133.60 and $129.70 and Mr. Oehlers argued that had these figures remained constant (as he suggested, they would have had Han Gor continued to act) the net profits would not have been less than $105 per day and that when the plaintiff had been paid his $75 out of these nett profits the defendant would have left, as his own personal gain, at least $30 per day. Upon this argument the item $390 in the defence and counterclaim was calculated. I do not think that these figures can be used to interpret the alleged contract. Had Han Gor been confined between the making of the contract and the first performance, upon what would the defendant's claim under the alleged oral contract have been based?

If therefore I accept the defendant's evidence it amounts to this that the plaintiff agreed to pay a sum (not liquidated damages) not exceeding $1,000 to be calculated in some way upon which the accounts had an unexplained bearing. Gee Jin denies this contract, and says that defendant did not ask for compensation, which I take to mean that he did not ask for it until after the expiry of the contract if not until after the issue of the writ.

Soon Pheow's evidence on the making of the alleged oral contract was as follows:—Defendant offered $100 per day. Defendant remarked that Han Gor was about to give birth. Gee Jin replied that if he was afraid of that he would pay $1,000 for damages in case defendant suffered loss. "He promised to pay a lump sum of $1,000. If Han Gor missed one night plaintiff was to pay $1,000." That certainly was not the agreement as pleaded nor did it correspond with the defendant's evidence. This witness was present at the meeting on the evening of the 18th between defendant and Gee Jin. His evidence was "That night at 7.30 saw defendant and Gee Jin together with Ng Cheok. Defendant said to Ng Cheok 'business is bad tonight.' Ng Cheok said there was a promise to pay $1,000 damages. Gee Jin told Ng Cheok to give him the money collected (Ng Cheok was defendant's book-keeper). He asked for $75 and there was not enough money. That was on the 18th." The defendant actually paid the $75 in respect of the 18th, though not until 21st. He paid in respect of 18th, 19th, 20th and 21st on each of which days his nett takings did not amount to the $75 he had to pay out of those nett takings. He paid nothing in respect of 22nd to 30th on each of which days the nett takings were also less than $75.

Now it is important to observe that this witness does not attribute to Gee Jin the words, "we will go into accounts later." True he says that Ng Cheok mentioned the promise to pay $1,000 damages in the presence of Gee Jin, but all this witness says that Gee Jin said on the occasion was "give me the money you have collected" and that he asked for $75.

This witness is therefore of no help in deciding what exactly the parties had agreed to.

The last witness Ng Cheok speaking of the making of the oral contract said " Gee Jin told the defendant if she (Han Gor) did not appear he was willing to pay any loss up to $1,000.' This witness gave no evidence of the conversation on the evening of the 18th.

While the defendant says he was to be paid some sum even if he made a profit, Ng Cheok says that it was only losses that were to be paid.

I have little doubt that on the 14th the defendant was to have some sort of *quid pro quo* arising out of Han Gor's condition but the evidence does not enable me to say what the agreement was. It is all too indefinite, and reverting to the words of Lord Moulton already quoted:—

> " such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contract but the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shewn."

I am therefore of opinion that the defendant had not succeeded in discharging the onus which was upon him of proving a contract which the Court can enforce.

The amount $650 sued on is admitted to be due. I therefore dismiss the counterclaim and give judgment for the plaintiff for $650 and costs.

Judgment accordingly.

Solicitors for the Plaintiff—
Aubrey Davies & Co.

Solicitors for the Defendant—
Claude da Silva & Co.

[ORIGINAL CIVIL JURISDICTION]

WHITLEY, J.

December 12, 1936.

IN THE MATTER OF ORDINANCE No. 135 (MUNICIPAL) AND OF THE SINGAPORE IMPROVEMENT ORDINANCE 1927

AND

IN THE MATTER OF THREE ORDERS OF THE GOVERNOR-IN-COUNCIL.

ALKAFF & COMPANY v. SIR SHENTON THOMAS AND OTHERS.

[SINGAPORE ORIGINATING MOTION No. 14 of 1935.]

Writs of Certiorari—Backlane Orders—Report by Commissioner of Lands—Allegations of Bias.

The Commissioner of Lands is an *ex officio* member of the Singapore Improvement Trust. Upon application made by the Singapore Improvement Trust, the Governor-in-Council appointed the Commissioner of Lands to enquire and report on three back-lane proposals made by the Singapore Improvement Trust under s. 144 sub-s. 1 of Ordinance No. 135 (Municipal) and s. 2 sub-s. 2 of the Singapore Improvement Ordinance. That officer enquired and reported and subsequently the Governor-in-Council made three several backlane orders. Applications were thereupon made by the applicants for a writ or writs of *certiorari* to quash such three backlane orders.

Held: 1. It is not necessary that each such order should be the subject matter of separate proceedings for *certiorari*. If different respondents were injuriously affected by improper joinder, they could apply to have their cases heard separately.

2. That the orders could properly be made personally against the Governor and the Officer Administering the Government respectively.

3. That in making each order the Governor-in-Council was performing *quasi*-judicial functions.

4. That justice must not only be done but must also seem to be done; but when bias is alleged the position of administrative bodies exercising *quasi*-judicial functions differs from cases of decisions by truly judicial tribunals. The Court ought to be slow to interfere with the former, but in the latter ought to interfere on much slighter grounds. Also where the interest is not pecuniary the question arises whether the interest is of such a substantial character as to make it likely that the judicial body has a real bias in the matter; a mere possibility of bias is not sufficient. That which has to be considered is the effect likely to be produced upon the minds of the public as to the fairness of the administration of justice; and the possibility of bias is a question of degree to be decided in each case.

5. That there was no reasonable ground in substance and in fact for suspecting any real bias in the Commissioner of Lands.

6. That so long as the Commissioner of Lands acted without bias and gave to each party the opportunity of adequately presenting their case, the Commissioner of Lands was not bound to hear owners orally.

ORIGINATING MOTION.

The applicants Messrs. Alkaff & Co. applied by way of Originating Motion for writs of *certiorari* to bring up three orders made by the Governor-in-Council under section 144 of Ordinance No. 135 (Municipal) and quash such orders. Two of the orders had been made by Sir Andrew Caldecott, (the Officer Administering the Government of the Straits Settlements during the absence on leave of the Governor H. E. Sir Thomas Shenton Thomas) and the third order had been made by the Governor H. E. Sir Thomas Shenton Thomas after his return from leave. In each case an application had been made by the Singapore Improvement Trust (under section 144 of Ordinance No. 135 (Municipal) and section 2, subsection 2 of the Singapore Improvement Ordinance, 1927) requesting the Governor-in-Council to order that a backlane be laid out. In each case the Governor-in-Council (or the Officer Administering the Government, as the case may be), had referred the matter to the Commissioner of Lands for enquiry and report under section 144, subsection 1 of Ordinance No. 135 (Municipal). By section 5, subsection 2 (d) of the Singapore Improvement Ordinance, 1927 (as amended by the Singapore Improvement (Amendment) Ordinance, 1930) the Commissioner of Lands is an *ex officio* Trustee of